IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 328/2005

1) Govind Bhudha Kanulkar,
   age about 61 years.
2) Anand Bhudha Kanulkar,
   age about 44 years.

   Both resident of Mhakhajan,
   Dhargal, Pernem, Goa. ..... Petitioners.

V/s.

1) Mrs. Surangi Rohidas Harmalkar,
   housewife, aged about 43 years,
   wife of
2) Rohidas Harischandra Harmalkar,
   age about 48 years,
3) Mrs. Anita Ashok Harmalkar,
   housewife, age about 45 years,
   wife of
4) Shri Ashok Gangaram Harmalkar,
   age about 51 years,
   All residing at Mhakhajan,
   Dhargal, Pernem, Goa.

5) Shri Sadashiv Shamba Harmalkar,
   major, agriculturist, residing
   at Mahakhajan, Dhargal, Pernem, Goa.

6) Smt. Sadashiv Shamba Harmalar,
   major, housewife,
   resident of Mahakhajan,
   Dhargal, Pernem, Goa. ..... Respondents.

Mr. D.J. Pangam, Advocate for the petitioners.

Respondents though served – absent.

CORAM : A.P. LAVANDE, J.

DATE : 17TH MARCH, 2006.

ORAL JUDGMENT :

Heard Mr. Pangam, the learned Counsel for the petitioners. Rule. The respondents though served have chosen not to put in appearance. Having regard to the controversy involved in the matter, heard forthwith.

2. By this petition, the petitioners who are the plaintiffs No.2 and 4 in Regular Civil Suit No. 127/89 in the Court of the Civil Judge, Junior Division, at Pernem, assail the order dated 30th March, 2005 dismissing the application dated 10.3.2005 filed by the petitioners for setting aside abatement, condonation of delay and for bringing heirs on record of the deceased plaintiffs No.1 and 3. The original plaintiffs No.1 and 3 expired on 2.11.02 and 6.3.05 respectively. The suit which was filed in the year 1989 was adjourned sine die from 16.3.96 since the issue of tenancy raised by the defendants was referred to the Mamlatdar for adjudication. According to Mr. Pangam, learned Counsel appearing on behalf of the petitioners, in the proceedings before the Mamlatdar, all the legal representatives of the plaintiffs No.1 and 3 who were opponents in the said case were brought on record, in time.

3. The case of the plaintiffs No.2 and 4 in the application filed by them for setting aside abatement is that the plaintiffs No.2 and 4 being Villagers were not aware that the legal representatives of the deceased plaintiffs No.1 and 3 had to be also brought on record in the suit. When the suit was taken up for hearing, the defendants/ respondents opposed the application and by the impugned order dated 30.3.2005, the trial Court dismissed the application mainly on the ground that the LRs. of the deceased plaintiffs No.1 and 3 were not brought on record within 90 days and, therefore, the delay could not be condoned. The trial Court further observed that any person can be added as party Under Order I, Rule 10 of the Code of Civil Procedure.

5. Mr. Pangam, the learned Counsel appearing for the petitioners placing reliance on the Judgment of the Apex Court in the case of **Mithailal Dalsangar Singh and ors.** v. A**nnabai Devram Kini and others**, reported in (2003) 10 SCC 691 submitted that the trial Court ought to have been liberal in allowing the application for setting aside the abatement, condonation of delay and for bringing the LRs. on record. According to the learned Counsel, the reasons given by the trial Court are wholly unsustainable in law and, therefore, the impugned order deserves to be quashed and set aside.

6. I have considered the submissions made by the learned

Counsel for the petitioners. I have perused the records. I find considerable merit in the submissions made by Mr. Pangam that the trial Court completely misdirected itself in law in holding that since the LRs. of the deceased plaintiffs No.1 and 3 were not brought on record within 90 days, the delay could not be condoned. The learned Counsel is justified in placing reliance on the Judgment of the Apex Court in **Mithailal Dalsangar Singh's case** (supra). It will be useful to reproduce the paras 8 and 9 in Mithailal Dalsangar Singh's case. They read as under :

> “8. Inasmuch as the abatement result in denial of hearing on merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a

matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."

7. Having regard to the principles laid down by the Apex Court

in **Mithailal Dalsangar Singh's** case, it is difficult to sustain the order passed by the trial Court. An application filed by a party in a suit for setting aside abatement, condonation of delay and bringing LRs on record has to be liberally construed. In the present case, the delay is neither intentional nor deliberate. In my opinion, there was sufficient cause for setting side the abatement and also for condoning the delay in bringing on record the LRs. of the deceased plaintiffs No.1 and 3.

8. In the light of the above discussion, the impugned order dated 30.3.2005 is, hereby, quashed and set aside. Application dated 10.3.05, filed by the plaintiffs No.2 and 4 before the trial Court is allowed. Rule is made absolute in the aforesaid terms. The petitioners to carry out the amendment to the cause title in Regular Civil Suit No.127/89 within a period of two weeks from the date of receipt of writ of this Court by the trial Court. No order as to costs.

A.P. LAVANDE, J.

ssm.